IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

APPEAL (L) NO.536 OF 2004
IN
MISCELLANEOUS PETITION NO.29 OF 2001
IN
TESTAMENTARY PETITION NO.432 OF 2000

Nanik Wadhumal Alimchandani ..Appellant.

Vs.

Mrs.Savitri Prem Mirchandani ..Respondent.

Mr.Rajgopal with Mrs.Rekha Rajgopal for the Appellant.

Mr.K.V.Tembe for the Respondent.

CORAM: A.P.SHAH AND
S.J.VAZIFDAR, JJ.

DATED: 3RD MARCH, 2005

ORAL JUDGMENT : (Per S.J.Vazifdar, J.)

By consent, the Appeal is admitted and heard forthwith.

2. This is an Appeal against the order of the learned Single Judge dated 10.7.2003 by which the learned Judge ordered that the above Miscellaneous Petition No.29 of 2001 does not survive in view of the withdrawal of the above main Petition No.432 of 2000 and that the order passed in the main Petition granting probate in favour of the Petitioner was

therefore revoked and cancelled.

3. The Respondent was the Petitioner in the above Petition No.432 of 2000. That Petition was filed by the Respondent for probate of the alleged last Will and testament of one Jairam Wadhumal Alimchandani dated 18.9.1996, who died at Texas on 19.9.1997. The deceased is the brother of the parties. Under the alleged Will, the Respondent is the executor and the sole beneficiary. The probate was granted by the order of this Court dated 24.7.2000.

4. The above Miscellaneous Petition No.29 of 2001 was filed for revocation of the probate dated 24.7.2000. The above Petition was filed in the Probate Petition itself as is clear from the title.

5. The impugned order in the above Petition was a consent order. Evidence was lead in the matter, parties were examined and cross-examined. Arguments were thereafter heard by the learned Single Judge. Before the judgment could be delivered, the Respondent who was represented by counsel, sought leave to withdraw the Probate Petition and agreed to the probate being cancelled and withdrawn. He further stated that he had no objection to the Will

being declared null and void and ineffective. Lastly, the Respondent also agreed to compensate the Petitioner by paying her a sum of Rs.50,000/- as compensation. In view of this application on behalf of the Respondent, the impugned order was passed. It is necessary to set out the operative part of the order.

"ORDER

1. This Petition No.29 of 2001 now does not survive in view of the withdrawal of main Petition No.432 of 2000, and the order passed therein by this Court granting probate in favour of original petitioner Nanik Alimchandani is, therefore, reversed and cancelled.

2. It is declared that the Will relied upon by the Nanik Alimchandani in that petition is null and void will having no effect to affect the right in the property in fvour of said Nanik Alimchandani in any manner whatsoever. Consequently, the petition no.29 of 2001 does not survive as the purpose for which it was filed is achieved by withdrawal of main Petition no.432 of 2001.

3. Undertaking given by original Petitioner Nanik Alimchandani, voluntarily and after consulting his advocate, is accepted that within four weeks from today he will pay Rs.50,000/- (Rupees Fifty Thousand only) to Savitri by Demand Draft. Petitioner

> Savitri and Respondent Nanik Alimchandani in Misc. Petition 29 of 2001 to remain present in this Court on 7th August, 2003 at 2.45 p.m. If the undertaking is not complied to or respected to, the Respondent Nanik Alimchandani will be liable for prosecution for contempt of Court. Matter is disposed of."

6. The Memo of Appeal makes several allegations against the learned Judge. It is alleged that the learned Judge "Summarily observed" that the judgment would be against the Appellant and that the Appellant would be prosecuted. It is alleged that the Appellant agreed to the said order being passed under pressure due to the observations from the Court.

7. It is important to note that the Respondent was represented before the learned Single Judge by counsel. It is further important to note that, as stated by the Respondent in the Memorandum of Appeal itself, he was advised by his counsel not to agree to the said order, that the observations of the learned Judge were wrong and that the Appellant could carry the matter in Appeal if the decision was against him. It is not the Appellant’s case that the learned Judge refused to hear his counsel. We

do not refer to this as accepting the Appellant's case but for demonstrating that it is not as if the Appellant was unrepresented or that the Appellant made the statement without legal advice or without being made aware of his rights. The Appellant consciously adopted a course of action despite legal advice to the contrary.

8. The allegations against the learned Judge are unfortunate and totally unwarranted. They ought never to have been made.

9. We will assume that the learned Judge expressed strongly an opinion adverse to the Appellant. Judges make observations and express their views during the course of a hearing. Till the judgment is delivered and pronounced, a Judge is entitled to change his mind. If the Appellant was of the view that the observations of the learned Judge were not warranted on a proper appreciation of the merits of the case, it was the duty of the Appellant or his Advocate to convince the learned Judge to the contrary or to await the judgment and challenge the same in Appeal. It is important to note that it is not even the Appellant's case that the learned Judge refused to hear his counsel. It is not open to a

litigant to consent to an order and thereafter allege that he was forced by the Court to do so. This can almost never be a ground for challenging an order. To held otherwise would lead to disastrous consequences. If such allegations are entertained, in every matter a party would be able to challenge consent orders on this ground.

10. We reiterate therefore that if a litigant is not in agreement with the views expressed by a Judge during the course of a hearing, it is for him or his Advocate to try and convince the Judge to the contrary and, in the event of his being unable to do so, to carry the matter in Appeal. He is not entitled to challenge the order passed with his consent on the ground that the Judge forced him to do so.

11. Mr.Rajgopal also submitted that the order was void inasmuch as the Appellant was not entitled to allow the probate to be revoked. He submitted that a probate operates in rem and that, therefore, the Appellant could not have consented to the probate being set aside or revoked. Mr.Rajgopal submitted that this was so in view of the fact that an order revoking the grant of the probate would affect

several third parties as well.

12. The submission is not well founded especially in the facts of this case. The Appellant was the executor and the only beneficiary of the Will. The only person who could therefore be affected by the revocation of the Will was the Appellant and nobody else. In such circumstances, it is open to the executor and the sole beneficiary to consent to the revocation of the probate.

13. Mr.Rajgopal, in support of this submission, relied upon the following observations in the judgment of the Supreme Court in *Chiranjilal Shrilal Goenka v. Jasjit Singh & Ors., (1993) 2 Supreme Court Cases, 507*:-

> "16. The grant of a probate by court of competent jurisdiction is in the nature of a proceeding in rem. So long as the order remains in force it is conclusive as to the due execution and validity of the will unless it is duly revoked as per law. It binds not only upon all the parties made before the court but also upon all other persons in all proceedings arising out of the will or claims under or connected therewith. The decision of the probate court, therefore, is the judgment in rem. The probate granted by the

> competent court is conclusive of the validity of the will until it is revoked and no evidence can be admitted to impeach it except in a proceeding taken by revoking the probate. In *Sheoparsan Singh v. Ramnandan Prasad Narayan Singh* the Judicial Committee was to consider whether the will which had been affirmed by a court of competent jurisdiction, would not be impugned in a court exercising original jurisdiction (civil court) in suit to declare the grant of probate illegal etc. The Privy Council held that the civil court has no jurisdiction to impugn the grant of probate by the court of competent jurisdiction. In that case the subordinate court of Muzafarbad was held to have had no jurisdiction to question the validity of the probate granted by the Calcutta High Court." (emphasis supplied)

14. The judgment is of no assistance to Mr.Rajgopal. The portion emphasized by us indicates that the probate granted by a competent Court is conclusive of the validity of the will until it is revoked. It is further clear from the judgment that a probate cannot be challenged except in proceedings taken for revoking the probate. In the present case admittedly, proceedings were adopted by the Respondents for revoking the probate. This was by filing the above Petition No.29 of 2001 which, in turn was filed in the above Testamentary Petition

No.432 of 2000 wherein the probate was granted. It was not even contended before us that Miscellaneous Petition No.29 of 2001 was not maintainable. That, the probate could validly have been revoked by the learned Judge on merits if the circumstances had so warranted, by allowing Miscellaneous Petition No.29 of 2001 is not disputed by Mr.Rajgopal. He merely objected to such an order being passed based on the consent of the executor in whose name the probate was granted.

15. The Appellant was the executor, sole legatee and the person at whose instance and in whose favour the probate was granted. Thus, in the facts of this case, when the Appellant himself did not desire to contest the matter, it was open to the learned Judge to pass the order on the basis of the statements and application made by the Appellant.

16. Mr.Rajgopal invited our attention to the order dated 26.8.2001 passed by the learned Single Judge in Review Petition No.67 of 2003 filed by the Appellant in respect of the impugned order. No Appeal has been filed against the said order. In any event, the issue will stand concluded by this order.

17. In the circumstances, the Appeal is dismissed. However, as a matter of indulgence, in view of the Appellant's age, the impugned order is modified only to the extent of deleting clause 3 thereof under which the Appellant is required to pay Rs.50,000/- to the Respondent.